

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the License
Revocation of Donald and
Carol Olesiak

**RECOMMENDED RULING ON THE
DEPARTMENT'S MOTION FOR
SUMMARY DISPOSITION**

This matter was brought before Administrative Law Judge Richard C. Luis on the Department's Motions for Summary Disposition filed by counsel on behalf of the Department of Human Services. Theresa Meinholz Gray, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127, submitted argument on behalf of the Minnesota Department of Human Services (hereinafter "the Department" or "DHS"). K. Scott Belfry, Attorney at Law, Belfry Law Office, 124 Avenue C, Suite 500, Cloquet, Minnesota 55720, submitted argument on behalf of the Licensees, Donald and Carol Olesiak (hereinafter "the Licensees"). A procedural conference was held on January 16, 2001, conducted by telephone. The record on the motion closed on January 31, 2001 with the receipt of the last filing.

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner of Human Services shall not be made until this Recommended Ruling has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Recommended Ruling, if any, shall be filed with Michael O'Keefe, Commissioner of Human Services, 444 Lafayette Road, St. Paul, Minnesota 55155.

Based on all the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that:

1. The Motion for Summary Disposition filed by the Department be GRANTED.
2. The Licensees' license to provide group family foster care be REVOKED.

Dated this 28 th day of February, 2001.

/s/

RICHARD C. LUIS
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

DHS has moved for summary disposition in this matter on the grounds that there are no material issues of fact in dispute and the party is entitled to disposition of this case in its favor as a matter of law. Summary disposition is the administrative equivalent of summary judgment.^[1] Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.^[2] A genuine issue is one that is not a sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.^[3]

To resist a motion for summary disposition successfully, the nonmoving party must show that specific facts are in dispute which have a bearing on the outcome of the case.^[4] The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05.^[5] The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.^[6] The nonmoving party also has the benefit of the most favorable view of the evidence. All doubts and inferences must be resolved against the moving party.^[7]

Background

The Licensees operate a group family foster home under license from DHS. On October 19, 1998, DHS informed the Licensees that they were disqualified from direct contact with persons in care due to a finding of neglect.^[8] The neglect cited was the Licensees' failure to prevent a third person from having unsupervised access to persons in care. That third person had been found to have sexually abused persons in care in the past. An agreement had been entered into between the Licensees and DHS that allowed that person to have direct contact with persons in care, but required supervision of that third person at all times.^[9] A DHS investigation found that the third person again sexually abused a person or persons in the Licensees' care, while not being supervised as required by the agreement.^[10] This finding constitutes the factual basis for the disqualification.

After receiving the notification that they were disqualified, the Licensees requested reconsideration of the finding of neglect.^[11] DHS issued a finding to them on November 18, 1998 upholding the finding of neglect.^[12] The finding included notice of the procedure for requesting a fair hearing under Minn. Stat. § 256.045, subd. 10i.^[13]

On December 10, 1998, DHS issued an Order of Conditional License and Order to Forfeit a Fine.^[14] The Order was based on the Department's finding that maltreatment through Licensees' neglect had occurred.

By letter dated February 10, 1999, DHS invited the Licensees to submit whatever additional evidence was available to show that the maltreatment previously found was not recurring.^[15] March 12, 1999 was the deadline specified for submitting that additional information.^[16] On September 17, 1999, DHS issued Findings of Fact and Conclusions that held the disqualifications to be correct.^[17] The Olesiaks were advised that this was the final agency decision and that appeal of the decision could be had by Petition for Writ of Certiorari with the Minnesota Court of Appeals and noted the applicable deadline for such an appeal.^[18] There is no evidence in the record on this motion to indicate that a timely appeal was filed.

Accompanying the final agency decision was an Order of Revocation.^[19] The Order of Revocation expressly stated that it "supercedes the Order of Conditional Licensure dated December 10, 1998."^[20] The basis for the revocation was cited as Minn. Rule 9543.3070 and Minn. Stat. § 245A.04.^[21] The Licensees requested a contested case hearing on September 27, 1999 to challenge the Order of Revocation.^[22]

The Department asserts that the law governing the undisputed facts in this matter leaves no issue remaining for hearing. The Licensees assert that they are entitled a hearing to assess fact issues incorrectly resolved in the Department's investigation. They also maintain that the issuance of the Order of Conditional Licensure precludes revocation of their license due to "equity, due process, equal protection of the law, and under the doctrines of *res judicata* and *collateral estoppel*" (*sic*).

Effect of Disqualification

A person with a disqualification is precluded from "any position allowing direct contact with persons receiving services from the license holder."^[23] Group family day care and foster care homes are subject to the rules set out in Minn. Rules 9502.0315-.0415.^[24] Minn. Rule 9502.0335, subd. 6, states in pertinent part:

Subp. 6. **Disqualification factors.** An applicant or provider shall not be issued a license or the license shall be revoked, not renewed, or suspended if the applicant, provider, or any other person living in the day care residence or present during the hours children are in care, or working with children:

* * *

D. Has a disqualification under part 9543.3070.^[25]

Applying the rule to the Licensees' situation, if the disqualification is not set aside, their family foster group home license must be revoked.

Appeal of Disqualification

Upon receiving a disqualification, the disqualified person can request reconsideration by the Commissioner of Human Services.^[26] Where reconsideration does not overturn the disqualification, the statute states:

(e) Except as provided in subdivision 3c [governing appeals by employees], **the commissioner's decision to disqualify an individual, including the decision to grant or deny a rescission or set aside a disqualification under this section, is the final administrative agency action and shall not be subject to further review in a contested case under chapter 14 involving a negative licensing appeal taken in response to the disqualification** or involving an accuracy and completeness appeal under section 13.04.^[27]

The plain language of Minn. Stat. § 245A.04, subd. 3b(e) sets out the appeal process for disqualifications. That language also expressly precludes consideration of the underlying facts of the disqualification in "negative licensing appeals." This matter is such an appeal. The issues of fact advanced by Licensees are all directed toward the propriety of the disqualification. Under Minn. Stat. § 245A.04, subd. 3b(e), those issues cannot be considered here. Thus, there are no genuine issues of material fact to be considered in this matter.

Impact of Conditional License Order

The Licensees assert that the Department's Conditional License Order of December 10, 1998 is a resolution of the issues in this matter and the doctrines of *res judicata* and collateral estoppel preclude DHS from taking any other actions against them arising from the facts presented here. The Department responded that repeated regulatory action arising from a single incident is not prohibited.^[28]

The Department relies on the holding in ***Wangen v. Commissioner of Public Safety***, 437 N.W.2d 120, (Minn.App. 1989), to support its argument that the doctrines of *res judicata* and collateral estoppel are not applicable to administrative matters. In ***Wangen***, the Minnesota Court of Appeals described the fundamental difference between judicial and administrative applications of *res judicata* with the following quote:

Court decisions are reflected in a judgment which is docketed and final; the trial court's work is at an end with regard to the matter. In the administrative process, however, agencies typically exert continuing supervisory and regulatory jurisdiction over the affected person. In addition, administrative policies are in a constant state of change, and administrative decision-makers are not only adjudicating but often policy-

making. Finally, administrative agencies are charged by a legislative body with protecting public health, safety, and welfare, not merely resolving past adjudicative facts in light of existing law.^[29]

The foregoing analysis applies to situations where a sanction is subject to later modification, typically to ease the sanction.^[30] That is not the case here. In this matter, two different actions have been taken. The first, the Conditional License Order, was taken in response to the maltreatment through neglect that occurred in the Licensees' family group home. The issues presented in that sanction are whether the facts support a conclusion that Licensees' conduct constitutes neglect and, if so, what sanction is appropriate. The second action was the Order for Revocation, based solely on the disqualification of the Licensees.

The Minnesota Supreme Court has addressed the applicability of *res judicata* (where the issue arose in an administrative action) as follows:

Under the doctrine of *res judicata*, parties to an action may be prohibited from raising any matter in a second suit that was or could have been litigated in the first suit. See **Youngstown Mines Corp. v. Prout**, 266 Minn. 450, 466, 124 N.W.2d 328, 340 (1963). The doctrine applies when the parties to the two actions are the same, the second suit is for the same cause of action, and the original judgment was on the merits. See *id.* Identity of subject matter does not establish that two claims are the same cause of action. See **Maryland Cas. Co. v. Baune**, 184 Minn. 550, 552, 239 N.W. 598, 599 (1931). In addition, if the right to assert the second claim did not arise at the same time as the right to assert the first claim, then the claims cannot be considered the same cause of action. See **Lloyd A. Fry Roofing Co. v. City of Minneapolis**, 551 F.2d 200, 201 (8th Cir.1977).^[31]

For the revocation, the only question is whether the Licensees are disqualified under Minn. Stat. § 245A.04. This is a different issue than those in the Conditional License Order. The disqualification was not final at the time that the Conditional License Order was issued. Thus, the Department was precluded from relying on the disqualification in order to impose a sanction when DHS issued the Conditional Order. The doctrine of *res judicata* is inapplicable under these facts.

The Department also asserts that collateral estoppel is inapplicable under the circumstances of this matter. Collateral estoppel is a means for precluding adjudicated issues in subsequent litigation. The doctrine has been expressly applied to administrative matters where an overriding government interest is not established.^[32] The standards for applying this doctrine are clear.^[33] Just as with *res judicata*, the issues must be identical between the two cases.^[34] As discussed above, the issues in the two matters are different. Collateral estoppel does not apply to this matter.^[35]

Conclusion

There are no genuine issues of material fact in this matter, since no appeal was taken from the Commissioner's denial of reconsideration of the Licensees' disqualification. Under Minn. Stat. § 245A.04, subd. 3b(e), the Commissioner's decision on the disqualification is the final agency decision. That statute also precludes examining the underlying facts in this proceeding. Under Minn. Rule 9502.0335, subp. 6.D., the Licensees' disqualification requires revocation of their license. For these reasons, the Administrative Law Judge has recommended that the Department's Motion for Summary Disposition be GRANTED and the Licensees' license to provide group family foster care be REVOKED.

R.C.L.

^[1] Minn. R. 1400.5500 (K).

^[2] **Sauter v. Sauter**, 70 N.W.2d 351, 353 (Minn. 1955); **Louwagie v. Witco Chemical Corp.**, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03.

^[3] **Illinois Farmers Insurance Co. v. Tapemark Co.**, 273 N.W.2d 630, 634 (Minn. 1978); **Highland Chateau v. Minnesota Department of Public Welfare**, 356 N.W. 2d 804, 808 (Minn. App. 1984).

^[4] **Hunt v. IBM Mid America Employees**, 384 N.W.2d 853, 855 (Minn. 1986).

^[5] *Id.*; **Murphy v. Country House, Inc.**, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (1976); **Carlisle v. City of Minneapolis**, 437 N.W.2d 712, 715 (Minn. App. 1988).

^[6] **Carlisle**, 437 N.W.2d at 715 (citing **Celotex Corp. v. Catrett**, 477 U.S. 317, 324 (1986)).

^[7] See **Celotex**, 477 U.S. at 325; **Thiele v. Stich**, 425 N.W.2d 580, 583 (Minn. 1988); **Greaton v. Enich**, 185 N.W.2d 876, 878 (Minn. 1971); **Dollander v. Rochester State Hospital**, 362 N.W.2d 386, 389 (Minn. App. 1985).

^[8] DHS Brief, Attachment 1.

^[9] DHS Brief, Attachment 4.

^[10] DHS Brief, Attachment 5.

^[11] DHS Brief, Attachments 2 and 3.

^[12] DHS Brief, Attachment 4.

^[13] *Id.*

^[14] Licensees' Brief, Attachment.

^[15] DHS Brief, Attachment 5, Findings of Fact, at 2.

^[16] *Id.*

^[17] *Id.*, at 11.

^[18] *Id.*

^[19] DHS Brief, Attachment 6.

^[20] *Id.*, at 1.

^[21] *Id.*

^[22] DHS Brief, Attachment 7.

^[23] Minn. Stat. § 245A.04, subd. 3d.

^[24] Minn. Rule 9502.0325, subp. 2.

^[25] Minn. Rule 9543.3070 has been repealed, and the repealer indicates that the rule was superceded by Minn. Stat. § 245A.04. The effect is the same.

^[26] Minn. Stat. § 245A.04, subd. 3b(a)-(d).

^[27] Minn. Stat. § 245A.04, subd. 3b(e)(emphasis added).

^[28] Department Reply, at 4.

^[29] **Wangen**, at 123 (quoting W. Keppel & D. Gilbert, *Minnesota Administrative Practice and Procedure* § 624 at 119-20 (1982)).

^[30] In **Wangen**, the two matters were the earlier and later requests for reinstatement of a revoked driving license. *Id.*, at 121-122.

^[31] **Care Institute, Incorporated-Roseville v. County of Ramsey**, 612 N.W.2d 443, 447 (Minn. 2000).

^[32] **Department of Human Services of State of Minn. v. Muriel Humphrey Residences**, 436 N.W.2d 110, 120 (Minn.App. 1989), *rev. denied* April 26, 1989.

^[33] **Falgren v. State, Bd. of Teaching**, 545 N.W.2d 901, 905 (Minn. 1996)(*citing Graham v. Special School Dist. No. 1*, 472 N.W.2d 114, 116 (Minn.1991)).

^[34] *Id.*

^[35] Licensees also raised the issue of double jeopardy in their brief. No cases were cited to support this issue under the facts present here. In a criminal prosecution, double jeopardy arises when a defendant has been tried on a charge and the State attempts to re-try the defendant on the same charge. See U.S. Const. Amend. V; Minn. Const. Art. I, § 7. As the Minnesota Supreme Court has stated:

The United States Supreme Court has recently returned to its earlier view that the Double Jeopardy Clause of the Fifth Amendment applies only to criminal punishment, not to civil sanctions that could be described as punishment or that serve some of the same purposes as criminal punishment.

Hudson, 522 U.S. 93, 118 S.Ct. at 493-95 (abrogating **United States v. Halper**, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989)).

Johnson v. 1996 GMC Sierra, VIN: 1GTEK19R4TE551384, License No: 960NHD, 606 N.W.2d 455, 459 (Minn.App. 2000).

The proposed revocation by DHS is not a criminal prosecution and therefore cannot constitute double jeopardy.